appellant in that case was a man possessed of both professional and technical skills. He started as a teacher and bettered his position by obtaining a Bachelor of Arts (Honours) degree in History and at the time of his accident he was a Division I officer in the Government Service and clearly marked out for promotion. The plaintiff in the case before me possesses no professional or technical skill of any kind and should he be able to get some form of employment after his retirement, it would be more of a sedentary nature.

Lastly, the plaintiff claims transport expenses to get to work both pre-trial and post-trial, but I am disallowing this item as such expenses have always been incurred by him even before the accident, the only difference is that since the accident, he is not able to use his motor-cycle to work. Before the accident he had incurred transport expenses in the purchase of petrol for his motor-cycle.

So for the special damages, judgment is entered for the plaintiff on the agreed sum of $4,900/- which will carry interest at 3% per annum from date of accident until date hereof to be borne by both defendants in proportion to their liability. There will also be judgment to the plaintiff for loss of future earnings totalling $21,957/- ($15,752 + $6,205) to be borne wholly by the second defendant following the decision in *Kow Nan Seng's* case above.

Finally, costs are also awarded to the plaintiff which will also be borne by both defendants in proportion to their liability.

Order accordingly.

Solicitors: *Khoo & Sidhu; R.K. Nathan & Co.*

LEE ANN v. MOHAMED SAHARI BIN ZAKARIA

[O.C.J. (Peh Swee Chin J.) November 28, 1985]

[Muar – Civil Suit No. 111 of 1984]

Damages – Paralysis – Injury to thoracic vertebra and leg shortening 2 c.m. – Plaintiff aged 64 years old.

Road Traffic – Plaintiff knocked down from behind – Defendant motorcyclist wholly to blame – Damages.

On October 3, 1982, the plaintiff, then 64 years old, was walking on a street when she was knocked into from behind by the defendant and his motor-cycle. The plaintiff sustained spinal injuries, resulting in paralysis from the waist down. She also suffered a 2 c.m. shortening of a leg. The plaintiff claimed damages while the defendant disputed liability.

Held: (1) in the circumstances the defendant is liable to the plaintiff who was not guilty of any contributory negligence;

(2) *General Damages:*

(a) fracture of a thoracic vertebra causing paralysis from the waist down : $70,000;

(b) fracture of tibia and fibula and 2 c.m. shortening : $6,000;

(c) loss of expectation of life : $2,000;

(d) pain and suffering in connecting with bladder washings : $7,000;

(e) laceration of right elbow : $300.

All the sums mentioned above would carry 8% interest per annum from date of service to date of satisfaction;

(3) *Special Damages:*

(a) cost of nursing care for 1983 : $200 p.m.;

(b) cost of nursing care for 1984 : $250 p.m.;

(c) from January 1, 1985 to date of judgment : $300 p.m.;

(d) cost of future nursing care at 5 years' purchase : $350 p.m.;

(e) cost of wheelchair $420;

(f) cost of surgery already incurred: $2,808;

(g) cost of washing bladder at 5 years' purchase : $150 p.m.;

(h) travelling expenses also awarded;

All the above sums would carry interest at 4% per annum from date of accident to date of judgment and thereafter at 8% per annum until satisfaction.

Cases referred to:

(1) *Wong Eng* v. *Chock Mun Chong* [1963] M.L.J. 204.

(2) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1955] 3 All E.R. 864; [1956] A.C 218; [1956] 2 W.L.R. 81.

(3) *Playing Cards (M) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.* [1980] 2 M.L.J. 182.

(4) *Flint* v. *Lovell* [1935] 1 K.B. 354.

(5) *Rose* v. *Ford* [1937] A.C. 826.

CIVIL SUIT.

E. Ramasamy for the plaintiff.
Abdul Hamid Said for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J. : Before dealing with the questions of liability and quantum in this running-down case, I think I should dispose of first, an

objection on a point of pleadings raised for the first time by the defendant in his learned counsel's written submission at the end of evidence.

It appeared that in her statement of claim, the plaintiff stated that she was "standing" on the left edge of the road when she was knocked into, whereas in her evidence, she said she was "walking" there instead.

Learned counsel cited *Wong Eng* v. *Chock Mun Chong*[1] and *Esso Petroleum Co. Ltd.* v. *Southport Corporation*[2] to support such objection that the plaintiff had failed to prove or produce evidence to prove her case as alleged in her pleading.

Learned counsel for plaintiff in reply submitted that the objection must be dismissed because the defendant was in no way misled, prejudiced, embarrassed or taken by surprise because at the very outset, it was the defendant's own contention that the plaintiff was walking and not standing at the time of impact. He cited a host of authorities including *Playing Cards (M) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.*[3] Counsel, in the alternative, also asked for leave to amend by substituting the word "walking" in place of the word "standing".

If the contention of learned counsel for defendant was that, on account of the difference between the evidence that she walked and her pleading that she stood, the claim must fail, he would be aiming too high. No objection was raised when she first said that she walked, so that such evidence would have to remain on record for what it was worth. Even if objection had been raised at that opportune moment, an application for amendment would have been certainly allowed by the Court as the amendment was so minor while the cause of action remained exactly the same, *inter alia*. If the application for amendment, for the sake of academic argument, was not allowed, but in view of the fact that the defendant was not taken by surprise and could not be said to be unable to meet his case, justice would have required that the substantial issue of liability between the parties be decided notwithstanding the presence of the said difference which, at the most, could be commented on as a discrepancy in submission as tending to establish or negative liability. I therefore dismissed the objection, and finding that the amendment was not necessary, made no order on the application of the plaintiff for amendment.

The plaintiff, an elderly woman, told the Court that between 9 a.m. to 10 a.m. on October 3, 1982, she was walking on the left-hand side of the main street, Tangkak town, in Johor when she was knocked into from behind by something. She fell and became unconscious and regained consciousness in hospital later.

In cross-examination, she said to the effect that she was by the side of the theatre and there were cars parked in front of the theatre one after another. She was at the time of the collision, about 5 feet from the nearest parked car.

In re-examination, she said that there was a drain between the theatre and the road and she was 3 or 4 feet from the drain across the theatre.

Sergeant Mohamed Dasir (PW 2) identified the driver of the motor-cycle involved in the accident as the defendant and the injured as the plaintiff. He identified the report lodged by the defendant and produced the sketch plan and key. He explained various markings on the sketch plan.

It would be pertinent to describe briefly the sketch plan. The sketch plan showed a broad metalled road of 61 feet in width. It was divided into three almost equal parts or lanes by two unbroken white lines, the left part as one faced Muar was 20 feet wide, the middle part and the right part being 22 feet and 19 feet wide respectively. In the middle part, there was a broken centre white line inside it. On the left edge of the left part was the drain spoken of by the plaintiff and in this part also was found a lamp post. Some distance away from the lamp post was found a scratch mark 18 feet long as one faced Muar, the mark ended at a place where a small pool of oil was found. It was not really disputed by both sides that the scratch mark was made by the motor-cycle involved and that the pool of oil had come from the same motor-cycle. It was not disputed by both sides that the theatre spoken of by the plaintiff was on the other side of the drain *vis-a-vis* the pool of oil etc. Further, it was also not in dispute that the motor-cycle was proceeding to the direction of Muar when the collision took place.

The Sergeant (PW 2) stated to the effect that the left edge of the said left part of the road was about 50 feet away from the theatre. He found vegetables strewn on the ground between the two ends of the scratch mark. Parking of vehicles was allowed inside both the right and left parts of the metalled road, and that the middle part of the road was used for people to drive to Muar, being the main passage for traffic.

The photographs of the scene, AB 13, showed very clearly the scene indeed. The said middle part of the road, with a broken centre white line in its middle was found with motor vehicles and even bicycles travelling thereon. They showed also motor vehicles to be parked on the said right and left parts of the road.

An eye-witness (PW 5) was in the vicinity of the scene of accident, and he was attending to his fruit stall at the time of the collision. He knew the plaintiff prior to the accident. He saw her, in effect, walking on the said left part on the left-hand side of a stationary car, she being about 4 feet from the said drain. The car had his right trafficator light turned on with a driver at the wheel. A motor-cycle came, he said to the effect, from behind the stationary car, and that the motor-cyclist, seeing that the car was about to turn to its right, swerved towards the left of the car, and in doing so, knocked down the plaintiff who then was walking towards the direction of Muar also.

In cross-examination, *inter alia*, he replied to the effect that he did not lodge a report neither did he tell the sergeant, who arrived there. He said to the effect that he could not remember the registration number of the car or its colour or its make. He said the car was a small van. He had known the plaintiff for 20 years and her family also. The motor-cyclist was coming fast so that he could not apply his brakes in time. He maintained that he saw the accident, and that the plaintiff was not crossing the road at the time of the accident. He could recognise the defendant. The stationary vehicle with the trafficator light switched on drove off.

The defendant in his evidence said that he was travelling at about 30 m.p.h. towards the direction of Muar and that he had a valid "L" licence. At the scene, he overtook one motor car and when overtaking it, a female Chinese was at the same time crossing the road in front of him. He could not avoid knocking into her. Before the accident, he was following the car. The car gave a signal to turn right, but had not turned to its right when he knocked into the female Chinese. Then again, he said that the car made a sudden turn to its right, making him lose control of his motor-cycle.

I observed that the defendant wavered in his evidence and seemed unsure as to what happened. In the same breath, he said he knocked into the female Chinese who was crossing the road just when he was overtaking the car. Then a different story was given about the car making a right hand turn, causing him to lose control of his motor-cycle and presumably to knock into the female Chinese.

In cross-examination, the defendant said that the car was on the centre white (broken) line, and after it gave the signal to turn right, it went straight on without turning right and that he was trying to overtake the car from the left of the car. Then the car made a slight turn to its left and defendant lost control of his motor-cycle and knocked into the female Chinese who was trying to cross the road from the left to the right.

I pause to observe that the defendant gave yet another discernibly different version of the accident, but he was only consistent on one matter throughout *i.e.* that the plaintiff was crossing the road from his left to right at the time of collision.

In his police report, defendant said that he was following the car when it gave a signal to turn right. On seeing an oncoming lorry, the motor car driver swerved to his left. The defendant in order to avoid the car that was swerving to its left, swerved to his own left and knocked down the female Chinese who was crossing the road from his left to his right.

I saw the plaintiff and PW 5 give evidence and accepted their evidence as true as against the evidence of defendant who prevaricated, contradicting himself repeatedly. I found him, as a witness, totally unreliable. The evidence of plaintiff and PW 5, the eye witness, was reinforced incontrovertibly by the sketch plan and key, photographs and the evidence of the sergeant.

I found that the plaintiff was walking on the said left part of the metalled road wherein motor vehicles were allowed to be parked towards the direction of Muar, when the defendant was coming from behind her and the stationary vehicle with its right-hand side trafficator light switched on. He was approaching them at an excessive speed or too fast in all the circumstances so that he could not pull up in time behind the said stationary vehicle. I found further that the defendant failed to keep a proper look-out by realising too late that the car with its trafficator light switched on was in fact stationary. I found that the plaintiff was not crossing the road at all but was knocked down on the said left part where

the vegetables were strewn about. The plaintiff was a hapless victim in an emergency situation created negligently by the defendant. I found the plaintiff totally blameless though the driver of that car who was not a party in this case, was negligent to some extent in giving a somewhat confusing signal. It would be unnecessary to discuss further regarding the driver of that stationary car. In the circumstances I found the defendant liable to the plaintiff who was not guilty of any contributory negligence.

The plaintiff sustained a fracture of a thoracic vertebra, leading to dense spastic paraplegia of both lower extremities *i.e.* inability to make use of her legs to walk, stand, squat and fend for herself, requiring help for her toilet and general body care, her condition being in effect, paralysis from the waist down. Learned counsel for defendant suggested a sum of $70,000 while learned counsel for plaintiff suggested a sum of between $100,000 to $120,000. In view of her advanced age, she being about 64 years old at the time of accident in 1982, I awarded a sum of $70,000.

For fractures of tibia and fibula, shortening of leg of 2 c.m , I found that the said shortening would not cause any more suffering than that already caused by her dense spastic paraplegia. I took into account the resulting overlapping effect and her age also in awarding only $6,000 for the fractures and shortening.

Curiously, the plaintiff, a living person, made a rather unusual claim for damages for loss of expectation of life which are almost invariably claimed for the estate of a deceased person. This however was a valid claim It is interesting to observe that this sort of claim was originally held to be confined to living plaintiffs and in *Flint* v. *Lovell*,[4] it was held that such a claim was not transmitted to the estate of a deceased person. The House of Lords in *Rose* v. *Ford*[5] upheld such a claim by a personal representative of a deceased. I awarded $2,000 only, a sum less than the conventional figure of $4,000, taking into account her advanced age.

As a result of her immobility, bladder stones would be formed and they would be a source of recurrent infections which could go to the kidney resulting finally in renal failure. Such stones would have to be washed out once in every four months. Dr. Kumar (PW 4) said she would have 5 to 6 years left of her life span. I assessed the remainder of her life span at 5 years which would give rise to 6 to 15 washings of the bladder. For pain and suffering in connection with these 15 washings, I awarded a sum of $7,000 taking into account contingencies.

I awarded $300 for the laceration of the right elbow. All the sums above-mentioned so far, would carry interest at 8% per annum from the date of service to date of satisfaction.

For the cost of nursing care for the whole year of 1983, I awarded $200 per month; for the whole year of 1984, at $250 per month, and from January 1, 1985 to date of judgment at $300 per month. I awarded cost of wheelchair at $420, and for cost of surgery already incurred, a sum of $2,808. I also awarded travelling expenses of various kinds, as specified in the order extracted and for all these sums mentioned in this paragraph, I awarded interest at 4% per annum from date of accident to date of judgment and thereafter at 8% per annum until satisfaction.

I also awarded cost of nursing care at $350 per month adopting the figure of 5 as the number of years' purchase by employing analogically the annuity tables. I also awarded cost of washing bladder at the rate of $150 per month which was arrived at by dividing the total cost of such washing for one year by 12. I also awarded costs to the plaintiff.

Order accordingly.

Solicitors: *E. Ramasamy & Co., Sri Ram, Zulkifly & Kumar.*

LEE SOH CHOO v. TAN KET HUAT

[O.C.J. (Siti Norma Yaakob J.) April 7, 1986]

[Kuala Lumpur – Originating Summons No. F. 2052 of 1985]

Family Law – Custody of children.

The applicant and the respondent in this application for custody were married on June 7, 1980 and from this union, a daughter was born on December 2, 1980 and a son on May 3, 1982. Since 1982, the applicant and respondent had been experiencing matrimonial problems which resulted in the present application by the applicant/wife seeking custody of the two children.

Held, dismissing the application: the applicant should be granted access to the children every Sunday from 9 a.m. to 6 p.m and should circumstances change that warrant a change in custody, the applicant will be at liberty to apply.

Observation: there is no substitute for a mother's love and attention, especially when the children are of tender